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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

T.B., Robert Brenneise, and Allison Brenneise, Plaintiffs, v. SAN DIEGO UNIFIED SCHOOL DISTRICT, Defendant.	Case No. 08 CV 0028 WHQ WMc (Consolidated with 08 CV 00039 WQH WMc) **SAN DIEGO UNIFIED SCHOOL DISTRICT'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR CERTIFICATION TO THE NINTH CIRCUIT OF THE COURT'S ORDER DENYING ITS MOTION TO DISMISS PLAINTIFFS' FOURTH CLAIM FOR RELIEF**
SAN DIEGO UNIFIED SCHOOL DISTRICT, Plaintiff, v. T.B., a minor, Allison Brenneise and Robert Brenneise, his parents, Steven Wyner, and Wyner and Tiffany, Defendants.	Date: August 18, 2008 Time: 9:00 a.m. Courtroom: 4 Judge: Hon. William Q. Hayes Trial: None Set Complaint Filed: January 4, 2008 **NO ORAL ARGUMENT UNLESS REQUESTED BY COURT**

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I. INTRODUCTION

The Opposition to the San Diego Unified School District's ("District") Motion for Certification attempts unsuccessfully to erode the Motion's premise that, as a matter of law, there is a controlling abstract question that will dispose of claims in each of the party's pleadings in this consolidated case and significantly impact advancing termination of the litigation. Additionally, the District is entitled to have the Ninth Circuit determine its claim of Eleventh Amendment Immunity. Interlocutory review of these issues is thus appropriate.

II. EXCEPTIONAL CIRCUMSTANCES IN THIS CASE DO MEET THE STANDARD FOR AN INTERLOCUTORY APPEAL

The parties agree that interlocutory appeals are to be allowed under 28 U.S.C. section 1292(b) "only in exceptional circumstances," but the Opposition fails in the attempt to show that such circumstances are not before the Court in this instance.

The issue of whether attorneys' fees are recoverable in connection with State administrative compliance complaints is "controlling" in significant portions of this case. The Opposition glibly states that "there is not the remotest possibility" of an interlocutory appeal "shortening the time, effort, or expense of conducting a lawsuit." The Brenneises and their counsel assert that this issue is "completely unrelated" to the issues in the appealed decision under the IDEA which these parties assert is "the primary focus of this litigation."

This statement overlooks the fact that *all* issues in dispute arose over the special education and services provided by the District to T.B. and that two out of five claims in this consolidated case would be determined by an interlocutory appeal. The opposing parties thought the issue of attorneys' fees in connection with the compliance complaint significant and important enough to amend their complaint to include this as an affirmative claim, despite the fact it would likely have been disposed of through the District's claim for declaratory relief.

As pointed out in the District's Motion, termination of the entire litigation is *not* a necessity to satisfy the requirement that the issue be "controlling." *Watson v. Yolo County Flood Control and Water Conservation Dist.*, Slip Copy, 2007 WL 4107539, *3 (E.D.Cal. 2007). If the other claims arising from the IDEA hearing are as separable from the compliance

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complaint fees issue as the Opposition argues, there is no merit to the averment that an interlocutory appeal would lead to a "substantial increase in time and cost."

The District has made a sound argument that judicial economies will follow an interlocutory appeal. The District has not requested a stay of the proceedings on the remaining three claims so they would be unaffected by interlocutory review. Nothing prevents the IDEA claims from proceeding to disposition by motion or otherwise. The entire subject of compliance complaint attorneys' fees, however, may be disposed of with an immediate appeal. This avoids litigation costs and is not, as the Opposition states, "a non-sequitor (sic)."

It is possible that certain issues may be resolved by the District Court that would obviate the need for an interlocutory appeal – e.g. whether or not the Brenneisses were prevailing parties in the compliance complaint, but that misses the point. If the Ninth Circuit were to decide the controlling issue of whether there is a cause of action for such fees, no findings need be made by the District Court on prevailing party status or on the amount of fees that would be reasonable. Thus, an immediate appeal results in a savings of time and effort by the District Court, not an increase of effort as the Opposition asserts. The Brenneisses speculate about a multitude of appeals if the Ninth Circuit affirms the District Court and the parties then go on to litigate these other issues on remand. However, this would always be the case with an interlocutory appeal – if the moving party is unsuccessful on appeal, the issues it sought to avoid will be litigated. The point is that if the District is successful in having the Ninth Circuit revisit its *Lucht* holding, no further litigation of this issue will be necessary at all.

Moreover, simply because the compliance complaint attorneys' fees issue can be addressed separately on an interlocutory appeal, does not render it "collateral to the basic issues," as contended by the Opposition, relying on one of the earlier cases that interpreted section 1292(b), *United States v. Woodbury*, 263 F.2d 784, 787-788 (9th Cir. 1959). Nor does it provide a reason to deny the pending Motion.[1] As discussed above, all of the issues before this Court emanate from the services offered or provide to T.B. "Collateral" issues, as

[1] To the extent the issue is really "collateral" to the case as the Brenneisses argue, it is likely appealable under the "collateral order rule." See, e.g., Meredith v. Oregon, 321 F.3d 807 (9th Cir. 2003).

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contemplated by the *Woodbury* court, dealt with denial of a motion to certify a dispute arising during document production in discovery, and not with a dispositive legal issue framed by the pleadings in two of the five causes of action between the parties.[2] The *Woodbury* action was for damages sought by a contractor for the construction of a housing project in Alaska under the Tort Claims Act. The "collateral" issue the court refused to certify for interlocutory appeal was a government claim of privilege for some of the documents ordered to be produced by the trial court. This is clearly distinguishable from the issue the District seeks here to present for interlocutory consideration which would entirely dispose of two causes of action if successful. Further, the discussion of the elements for certification in *Woodbury* actually supports the instant Motion and is consistent with the District's arguments in support of its request under 28 U.S.C. section 1292(b).

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III. A SUBSTANTIAL DIFFERENCE OF OPINION DOES EXIST

Contrary to the bold statement in the Opposition, there is a substantial difference of opinion whether attorneys' fees recovery may follow affirmative results from a compliance complaint. See e.g. *Greenland School Dist. v. Amy N.*, 358 F.3d 150 (1st Cir. 2004) (". . .any subsequent obligations it had to provide educational services to Katie were matters for the state administrative procedure, which would apply different standards to evaluate the services provided than did the due process hearing officer. See 34 C.F.R. § 300.457(c) (question in state administrative procedure is whether the district met its obligations under §§ 300.451-300.462). That decision, moreover, would not be appealable to federal court. *See Vultaggio v. Bd. of Educ.*, 343 F.3d 598, 601 (2d Cir.2003).")

District has shown that the Ninth Circuit holding in *Lucht v. Molalla River School District*, 225 F.3d 1023 (9th Cir. 2000), is based on prior law and has not been followed in other Circuits and not uniformly followed in practice in California and presumably elsewhere in the Ninth Circuit. (*see* Decl. of J. Cias accompanying the Motion). In addition, as indicated in the District's papers, at least one other district court in the Ninth Circuit has declined to follow

[2] Subsequent to the District's filing of its motion for certification, the Brenneisses filed three counterclaims. These are the subject of the District's pending motion to dismiss.

Lucht's lead when given the opportunity to do so. (*Melodee H. v. Department of Educ.*, 374 F.Supp.2d 886, 891-893 (D.Haw. 2005) [declining to extend Lucht's reasoning].)

As developed at length in the Motion, the Supreme Court holding in *Buckhannon Bd. & Care Home, Inc. v. West Va. Dep't of Health & Human Res.,* 532 U.S. 598 (2001), which the Ninth Circuit has subsequently adopted and explicitly applied to the IDEA in *Shapiro v. Paradise Valley Unified School District*, 374 F.3d 857 (9th Cir. 2004), underscores the *Lucht* holding's inconsistency with Supreme Court authority.

The District respectfully disagrees with this Court's conclusions that *P.N. v. Seattle Sch. Dist. No. 1*, 974 F.3d 1165 (9th Cir. 2007) held or even addressed the question of whether compliance complaints provide sufficient judicial imprimatur to warrant fees under *Buckhannon*. As this Court recognized, in citing to *P.N.*, "there may remain some uncertainty as to what might constitute 'judicial imprimatur,' the existence of some judicial sanction is a prerequisite in this circuit for determination that a plaintiff is a 'prevailing party' and entitled to an award of attorneys' fees as part of the costs under the IDEA." (Order, 17:5-8) That is the uncertainty the District seeks to address through this appeal. In *P.N.*, the Ninth Circuit cited *Lucht* for the proposition that the federal court had jurisdiction over an action solely to recover attorneys' fees under the IDEA. *Id.* at 1169. The District does not dispute this. Notwithstanding, the Ninth Circuit repeatedly affirmed *Buckhannon* judicial imprimatur requirement when attorneys' fees are sought under the IDEA, and also explicitly acknowledged the uncertainty that exists. Id. at 1168-1169, 1170. Thus, contrary to plaintiffs' assertions in the Opposition, *P.N.* does not provide authority for any entitlement to fees under the IDEA absent the necessary judicial imprimatur.

The Opposition correctly states that *Lucht* is the Ninth Circuit case on the subject of attorneys' fees in compliance complaint proceedings. As discussed in detail in the moving papers, *Lucht* is simply out of date and based on the prior state of the law. In view of the Supreme Court's clear requirement of "judicial imprimatur" in *Buckhannon* and the latest United States Department of Education regulations explicitly stating that such fees are not allowable in this context, the earlier *Lucht* decision has caused confusion in the educational

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community. The uncertainly and disagreement regarding its continuing viability cannot be dismissed as the Opposition so freely tries to do.

The Opposition fails in its attempt to distinguish the District's citation of *APCC Services, Inc. v. AT & T Corp.*, 297 F.Supp.2d 101, 107 (D.D.C. 2003) by inaccurately characterizing that court's granting of an interlocutory appeal motion as appropriate only where the Circuit in question has not ruled on an issue. The Brenneises contend that certification of an interlocutory appeal should only apply in where there is an absence of a ruling on the issue by the Circuit; this contention misses the mark. *APCC Services* concerned the issue of standing for assignees of payphone service providers to recover from long distance carriers "dial-around compensation" under the Telecommunications Act of 1934, as amended, 47 U.S.C. section 276, and the implementing regulations, 47 C.F.R. section 64.1300. In this context, the moving parties successfully sought certification of an interlocutory appeal to decide whether they had standing under this statute and interpretive regulations. As in the instant case, the standing issue was "controlling" as to whether a particular legal claim could be asserted. Like here, *APCC Services* involved the threshold issue of whether a cause of action existed.

The District of Columbia District Court also squarely addresses the question of "substantial difference of opinion" as a required element for considering an interlocutory appeal. The trial judge in *APCC Services* found, at 107, that a "substantial difference of opinion is often established by a *dearth* of precedent within the controlling jurisdiction and conflicting decisions in other circuits. [Citations omitted] A substantial ground for dispute also exists where a court's challenged decision conflicts with decisions of several other courts." (Emphasis supplied). This is precisely the circumstance presented to this Court. There are decisions conflicting with *Lucht* throughout the federal court system, well-known and acknowledged later contrary authority from the Supreme Court, subsequent amendments to the IDEA and the implementing regulations, and clearly a *dearth*, although not an absence, of precedent in the Ninth Circuit. "Dearth" means an inadequate supply or lack, not an absence. (See Miriam-Webster's Online Dictionary, http://www.merriam-webster.com/dictionary/dearth, last viewed August 11, 2008).

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The *APCC Services* court recognized that it was promoting sound public policy by certifying an interlocutory appellate review to benefit "the industry as a whole." In that case the "industry" was telecommunications. The "industry" in the current matter is the vast community of public education and special education students and their parents within the Ninth Circuit. An interlocutory appeal at this time would bring needed clarity to countless parents and school districts alike. The clear benefit to special education students and educational providers within the Ninth Circuit to have an opportunity to revisit *Lucht* in light of *Buckhannon* and the revision of federal regulations is reason enough alone to grant the District's Motion for an interlocutory appeal.

IV. THE DISTRICT IS ASSERTING A GOOD FAITH IMMUNITY CLAIM

The District raised an Eleventh Amendment immunity defense that was not ruled on by this Court when denying the District's Motion to Dismiss the Third and Fourth Claims. This renders the issue an appealable final decision pursuant to *Way v. County of Ventura*, 348 F.3d 808, 810 (9th Cir. 2003) and *Will v. Hallock*, 546 U.S. 345, 349-350 (2006) as discussed in detail in the Motion for Certification.

The Opposition states that, despite "a close reading of the District's papers," counsel was unable to find where the District raised such an argument. For the record, it was stated in the District's Reply to the opposition to the Amended Motion to Dismiss the Third and Fourth Claims, page 10, starting at line 3.

Contrary to the Opposition's assertion, Eleventh Amendment immunity is not a frivolous contention in the context of whether a District is subject to claims for attorneys' fees following compliance complaints. The Supreme Court in *Arlington Cent. Sch. Dist. Bd .of Educ. v. Murphy,* 548 U.S. 291, 298-297 (2006) restated the bright line standard for statutes such as the IDEA enacted under the Constitution's Spending Clause. That which is not explicitly set forth in the statute is not allowed. *Ibid.* In *Arlington,* the disallowed recovery was for expert fees incurred by parents in an IDEA due process proceeding because there was no explicit authority for such reimbursement in the IDEA. (*Id.* at 298.)

20 U.S.C. section 1415 lays out specifically the parents' "Procedural Safeguards" with

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respect to due process administrative hearings and appeals therefrom. There is no provision in the IDEA for compliance procedures or much less for recovering attorneys' fees for prevailing parties. Congress laid out such rights for administrative due process hearings in the IDEA and the Department of Education followed with promulgated regulations, 34 C.F.R. sections 300.500-537. No entitlement has been created for compliance procedures or for fees in connection with such procedures in addition to the clear lack of judicial imprimatur preventing acquisition of prevailing party status in any case.

Moreover, there is no merit to the assertion that the District waived its immunity defense by filing its own complaint. The District's complaint makes clear that the District sought jurisdiction for its declaratory relief claim under the Declaratory Judgment Act, 28 U.S.C. section 2201(a), and under the general jurisdictional statute for federal questions, 28 U.S.C. section 1331.

The District has stated sound grounds for a direct appeal on either the basis of immunity. The interlocutory appeal should be permitted.

V. CONCLUSION

The Opposition to the District's Motion for Certification raises no legal impediments to interlocutory appellate review of the question of entitlement to attorney's fees and costs to a prevailing party following a compliance complaint. The District's Motion for Certification should be granted.

DATED: August 11, 2008

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CERTIFICATE OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action; my business address is: 750 B Street, Suite 2310, San Diego, California, 92101.

On the date set forth below I caused the foregoing documents described as following documents:

SAN DIEGO UNIFIED SCHOOL DISTRICT'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR CERTIFICATION TO THE NINTH CIRCUIT OF THE COURT'S ORDER DENYING ITS MOTION TO DISMISS PLAINTIFFS' FOURTH CLAIM FOR RELIEF

to be served on plaintiffs by serving counsel of record electronically, having verified on the court's CM/ECF website that such counsel is currently on the list to receive emails for this case, and that there are no attorneys on the manual notice list.

Dated: August 11, 2008

Janice Karr